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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MITCHELL MORAN DAVID, Defendant and Appellant.	G041977 (Super. Ct. No. 08452550-02) O P I N I O N

Appeal from a judgment of the Superior Court of Inyo County, John I. Kelly, Judge. Reversed.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

A large group of partygoers in Bishop, California, rang in the New Year by drinking and fighting. Relevant to this appeal, the host of the party, Johnny Shoshone was injured when he opened his front door and was attacked by Mitchell Moran David and James Eugene Williams. A jury convicted both David and Williams of assault by means of force likely to produce great bodily injury (felony assault) and misdemeanor battery.[1] We conclude there was prejudicial instructional error in this case warranting reversal of the judgment.

I

There were over 30 people at the New Year's Eve party hosted by Shoshone and his girlfriend, Tabaytha Boyer. Many of the partygoers were intoxicated, including Shoshone. Around 1:00 a.m. the morning of January 1, 2008, Williams and David arrived at the party. Shoshone had known Williams for years and David was a distant cousin.

When Shoshone stepped outside onto the front porch, Williams punched his face, knocking him off the porch and down onto the ground. Williams and David proceeded to punch and kick Shoshone as he lay on the ground, until other partygoers stopped the attack. Boyer heard Williams yell out as he left the house, "That was for my boy, Tyler [Weaver]." This comment was apparently made in reference to a past tragic incident when Weaver was hit and killed by a driver who remained unidentified for several years, until Shoshone informed the police (and collected a $50,000 reward) the driver was his friend John Salais.

Shoshone did not immediately call the police after the attack because he was intoxicated and he did not think it was a "big deal." He drank more beer and the

[1] David and Williams both filed appeals. In the opening briefs, they raised different issues but indicated they wished to join in their co-appellant's arguments. Before the case was submitted, Williams died and his appeal was abated. However, we will address the issues raised by Williams as if they were raised by David due to his statement of joinder.

party continued. However, Shoshone called 911 when Williams and David returned to the party with two women, who got into an altercation with Boyer. When the sheriff deputies arrived, Shoshone said his leg and ankle hurt. He told a deputy he believed the attack was in retaliation for his role in the Weaver incident. The deputy noted Shoshone was limping and intoxicated. Later that day, Shoshone went to the hospital where he learned he had a broken leg requiring surgery. A few days later, Shoshone decided he wanted to press charges.

The information charged Williams and David jointly with felony assault (count 1), and battery with serious bodily injury (count 2). As to both counts, it was alleged the defendants inflicted great bodily injury. It addition, the information alleged David had suffered a serious felony conviction within the meaning of the Three Strikes Law and that he had served a prior prison term. The jury found the defendants guilty of count one, but as to count two it concluded the lesser offense of misdemeanor battery was appropriate. The jury concluded the great bodily injury allegation was not true. Before sentencing, David admitted the prior felony conviction and prison term allegations. He was sentenced to a total term of seven years, consisting of the midterm of three years, doubled pursuant to the Three Strikes Law plus one year for the prior prison term. The court imposed a concurrent 180-day term for count 2.

II

A. Instructional Error—A Juror's Question Went Unanswered

David contends the trial court violated his federal and state rights to a reliable jury verdict by refusing to answer a juror's request to define a word in the instructions. He asserts the error was structural and mandates per se reversal because harmless error review is not possible in this case. Alternatively, David asserts his trial counsel did not object to this error and this failure was ineffective assistance of counsel. We agree the court erred, and the judgment must be reversed for this reason.

After the trial judge, John I. Kelly, read all the instructions to the jury in open court, the following exchange took place:

"The court: So, yes, did you have a question?

"Juror 48580: There's a note on there with a question on it that I would like answered. I have a question about—I have a question about a definition of a word that's being used. Is it—is it timely to ask that in open court, that question about the finding—about the legal definition of a term you've been using[?]

"The court: Of what?

"Juror 48580: Of a legal definition, of a term, you've been using.

"The court: Unless it's expressed in the instructions, then you have to use your own common sense.

"Juror 48580: And I cannot look it up in the dictionary.

"The court: No sir. No. You should—after the case is all over, if you have further interests, the Court's certainly, or the powers that be, will be happy to address it. But it can't be done at this point in the process, okay? Does that answer your question?

"Juror 48580: Yes sir.

"The court: Not very well. But it—

"Juror 48580: It certainly doesn't satisfy me, going in ignorant of something."

The jury was then excused for the day. When it returned a different trial judge, Brian J. Lamb, was assigned to the case and reread some of the instructions, including what to do if they had a question. Later that day, the jury submitted a note asking if there was a misstatement in the verdict form in "special allegation number 2" referring to *great* bodily injury when the information, count 2, refers to *serious* bodily injury. The following day, the jury was given amended verdict forms to clarify the matter, and yet another trial judge, Dean T. Stout, explained the difference between great and serious bodily injury in the instructions.

In light of the above, we conclude Judge Kelly erred. Juror 48580, who later became the jury's foreperson, asked a question about the instructions that clearly triggered Penal Code section 1138.[2] "The statute provides in part: 'After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . . .' 'This means the trial "court has a primary duty to help the jury understand the legal principles it is asked to apply. [Citation.] This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.]" (*People v. Beardslee* (1991) 53 Cal.3d 68, 97 (*Beardslee*).) However, "[a] definition of a commonly used term may nevertheless be required if the jury exhibits confusion over the term's meaning. [Citation.] [Citations.]" (*People v. Montero* (2007) 155 Cal.App.4th 1170, 1179.)

Here, the trial judge erred by failing to determine exactly what "term" in the instructions the juror did not understand. Without knowing the word being questioned, the judge's cavalier response to (1) look again at the instructions, (2) use common sense, or (3) wait until the case is "all over" to ask the question was improper. The judge in essence ignored the question rather than exercise its discretion to determine what, if any, additional explanation was necessary.

The record shows the jury foreperson recognized the lack of proper guidance and bravely expressed dissatisfaction about starting deliberations "being ignorant of something." Surprisingly, this rebuke still did not prompt the judge to

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[2] All further statutory references are to the Penal Code.

perform his duty and ensure the jury understood the legal principles it was asked to apply. (*Beardslee, supra,* 53 Cal.3d at p. 97.) "The trial court was understandably reluctant to strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given. This court did not do so." (*Ibid.*)

"A violation of section 1138 does not warrant reversal unless prejudice is shown. [Citation.]" (*Beardslee, supra,* 53 Cal.3d at p. 97.) The Attorney General argues David has not shown prejudice, "there is only pure speculation by [David] that the jurors were supposedly rendered 'incapable of performing their function,' and had to simply guess at the meaning of terms they did not understand." The Attorney General discusses cases in which incorrect definitions were deemed trial error, not structural errors, and therefore subject to harmless error analysis. (See *People v. Flood* (1998) 18 Cal.4th 470, 493.)

The obvious problem with taking such an approach in this case is the trial judge never determined the basis for the juror's question. It cannot be said with any degree of certainty the unknown term related to a legal principle, or a required finding, or a commonly used term, or to an incorrect definition. Contrary to the people's assertion, there is no basis on which to assume either that the jury experienced no difficulty, or had a great deal of difficulty, in reaching its verdict after the judge failed to address the unknown word. Unlike other cases, we cannot hold other instructions clarified the matter without pinpointing the source of the confusion. (Cf. *Beardslee, supra,* 53 Cal.3d at p. 97 [harmless error in refusing to clarify instruction of murder because aiding and abetting instructions clearly addressed the issue and any possible prejudice would have been to the prosecution].) And we cannot speculate about what would or could have happened if the judge had asked about the exact nature of the juror's inquiry, to then determine if the failure to ask was harmless error. "To perform their job properly and fairly, jurors must

understand the legal principles they are charged with applying. It is the trial judge's function to facilitate such an understanding by any available means." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) Under either the *Chapman v. California* (1967) 386 U.S. 18 or *People v. Watson* (1956) 46 Cal.2d 818, standards, the trial judge's failure to perform his duties when faced with an instructional question was reversible error because there is no way to ascertain if the jurors properly and fairly performed their functions as jurors in this case.

B. The Surprise Dismissal of the Victim's Statutory Rape Conviction Before Trial

The prosecutor failed to timely respond to *Brady* discovery requests regarding the victim's criminal record. (*Brady v. Maryland* (1963) 373 U.S. 83.) On the eve of trial, David was surprised to learn from the prosecutor (1) Shoshone had a prior statutory rape conviction, (2) it had recently been dismissed, and (3) the same defense attorney (Gerard Harvey) who represented Williams at the preliminary hearing, and David for just one month after the preliminary hearing, was also Shoshone's counsel at the expungement hearing.[3] David also discovered the prosecution attended the expungement hearing, supporting the probation department's recommendation to first reduce Shoshone's section 261.5, subdivision (c), felony conviction to a misdemeanor under section 17, subdivision (b) and then dismiss it pursuant to section 1203.4.

David was upset he had missed the opportunity to use the conviction for impeachment purposes. David filed a motion for discovery sanctions. The trial court determined the best remedy would be to admit evidence of the prior conviction by the prosecutor on direct examination, but specific details of the offense would not be permitted.

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[3] Harvey obtained conflict waivers from Williams and David, but he failed to disclose his role in the expungement hearing. We note the Attorney General makes the argument that conflict waiver is valid despite the significant undisclosed information. We are not impressed. This is simply not the law.

On appeal, David (and Williams) raised many arguments relating to perceived problems in the timing of, manner of disclosure, and remedy following the victim's expungement proceedings. David acknowledges Shoshone had a statutory right to petition for dismissal of his felony rape conviction because he had satisfied the terms of his probation. (§ 1203.4.)[4] He recognizes that as a matter of law a dismissed felony conviction cannot be used to impeach a witness, unless the witness himself is on trial. (§ 1203.4.) Nevertheless, he complains the errors deprived him of a fair trial and evidence of the conviction and underlying statutory rape should have been admitted for impeachment purposes. Because we have reversed the judgment on other grounds, we need not address the arguments of ineffective assistance of counsel, prosecutorial misconduct, and trial court error. The only issue likely to resurface if the case is retried is whether David can again impeach Shoshone with evidence of the dismissed conviction.

We recognize, "[C]ourts have broad discretion in determining the appropriate sanction for discovery abuse, and recognize that sanctions ranging from dismissal to the giving of special jury instructions may be required in order to ensure that the defendant receives a fair trial, particularly when potentially favorable evidence has been suppressed. [Citations.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 951-952 ["Defendant cites no case, and our research has disclosed none, establishing that the

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[4] "'Section 1203.4, subdivision (a) "allows for probationers to have their convictions set aside and the accusations against them dismissed, and similarly provides that, with specified exceptions, such a defendant 'shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted.'" [Citation.] """A grant of relief under section 1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of his conviction. . . ."""" [Citation.] "However, such relief '"does not, properly speaking, 'expunge' the prior conviction. The statute does not purport to render the conviction a legal nullity.'" [Citation.]' [Citation.]" (*Doe v. Brown* (2009) 177 Cal.App.4th 408, 418 [sex offender who had completed probation for the offense of committing lewd act upon child held not entitled to prevent Department of Justice from publishing personal information on the Megan's Law sex offender Web site].)

prosecutor's pretrial delay—whether willful or not—in disclosing inculpatory evidence to the defendant requires a particular sanction as a matter of due process, or that failure to impose a sanction for a period of delay that occurred long before trial requires reversal of a conviction in the absence of prejudice to the defendant at trial"].)

However, whether the evidentiary discovery sanction should be imposed in a second trial must be decided by the trial court in the first instance. "[A]n unconditional reversal ordinarily wipes the slate clean. [Citation.] This is consistent with a long line of authority holding that parties are entitled to have the trial court 'redetermine' evidentiary and other matters after an unconditional reversal. [Citation.] To the extent such a redetermination rests on findings of fact, the remand court must make those findings anew, without relying on the findings of fact made in connection with the prior trial. Similarly, on retrial the court must reevaluate matters committed to judicial discretion, without relying upon any exercise of judicial discretion in the prior trial." (*People v. Anderson* (2008) 169 Cal.App.4th 321, 332; *People v. Sons* (2008) 164 Cal.App.4th 90, 101-102 [Judge in defendant's third retrial for homicide was not bound by the decision of the judge in defendant's first and second retrials to give sanction instruction for original prosecutor's failure to provide discovery relating to victim's history of improper behavior as officer].)

The trial court must exercise its discretion and decide what, if any, sanction order for the prosecutor's purported discovery violation in the first trial would be appropriate in the second trial. Certainly, David is now aware of the dismissed rape conviction, and he does not suggest he had the authority to stop or delay the expungement proceedings. Yet, the seemingly secretive and last minute clean up of a witness suggests gamesmanship and risks harming the public's trust in the prosecution. In any event, we cannot weigh in on the issue: "'An unqualified reversal remands the cause for new trial and places the parties in the trial court in the same position as if the cause had never been tried.' [Citation.] . . . [¶] That status even permits amendment of the accusatory

pleading [citation], as well as renewal and reconsideration of pretrial motions and objections to the admission of evidence . . . and the court must consider the admissibility of that evidence at the time it is offered. [Citations.]" (*People v. Mattson* (1990) 50 Cal.3d 826, 849, superseded on other grounds by statute as stated in *People v. Bolin* (1998) 18 Cal.4th 297, 315, fn. 2.)

C. The Evidence Witnesses Were Scared of Retaliation

David asserts it was prosecutorial misconduct to ask two witnesses if they feared retaliation for their trial testimony, and misconduct to later comment about this testimony in closing argument. The court overruled David's objection to the questioning. And David's counsel did not object to the closing argument commentary. Because this issue may be revisited on retrial, we will address it. We find no error. The evidence was relevant as it related to the witnesses credibility. (Evid. Code, § 210; *People v. Burgener* (2003) 29 Cal.4th 833, 869.)

"Evidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. [Citations.] Testimony a witness is fearful of retaliation similarly relates to that witness's credibility and is also admissible. [Citation.] It is not necessary to show threats against the witness were made by the defendant personally, or the witness's fear of retaliation is directly linked to the defendant for the evidence to be admissible. [Citation.] [¶] The Supreme Court's decision in *People v. Avalos* (1984) 37 Cal.3d 216 is instructive. In that case an eyewitness was reluctant to identify the defendant in court although she had previously identified him in an in-person lineup. After a hearing the trial court ruled the fact the witness felt fear, whether or nor caused by specific acts of any person connected with the trial, was relevant to her credibility and that the probative value of the evidence outweighed any potential prejudice to the defendant. [Citation.] The Supreme Court agreed and held the 'determination that an explanation of Ms. Martinez' hesitation would be relevant to the jury's assessment of her credibility was well within the discretion of the trial court.'

[Citation.]" (*People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588.) Moreover, as wisely surmised by one court, "A witness who testifies despite fear of recrimination of *any* kind by *anyone* is more credible because of his or her personal stake in the testimony." (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369.)

D. Sentencing Error

David and the Attorney General agree the court should have stayed the sentence for count 2, misdemeanor battery pursuant to section 654. In light of our ruling, this issue is now moot.

III

The judgment is reversed. The motion for judicial notice of court documents relating to the expungement hearing is granted.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.